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No. 83-977

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

LOUIE L. WAINWRIGHT, Secretary
Department of Offender Rehabilitation
State of Florida

Petitioner,

vs.

JOHN HUDGINS,
#045861

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO BRIEF ON JURISDICTION

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING FEDERAL QUESTIONS INVOLVED IN "THOUSANDS OF HABEAS CORPUS PETITIONS" FILED BY STATE PRISONERS.

2. WHETHER THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT REQUIRING THE EXHAUSTION OF STATE JUDICIAL REMEDIES.

3. WHETHER THE FEDERAL CONSTITUTIONAL STANDARD TO ESTABLISH DOUBLE JEOPARDY IN VIOLATION OF THE FIFTH AMENDMENT IS SIMILAR TO FLORIDA'S "SINGLE TRANSACTION" RULE, SO AS TO PERMIT THE DISTRICT COURT TO CONSIDER THE RESPONDENT'S CLAIM AS ONE INVOLVING DOUBLE JEOPARDY.

4. WHETHER RESPONDENT'S DUAL SENTENCE FOR AGGRAVATED BATTERY AND FOR UNLAWFUL POSSESSION OF A FIREARM WHILE ENGAGED IN A CRIMINAL OFFENSE VIOLATES THE FIFTH AMENDMENT PROHIBITION AGAINST DOUBLE JEOPARDY.

5. WHETHER THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT WHICH HOLD THAT CHALLENGES TO THE STATE COURT'S APPLICATION OF ITS OWN LAWS OR RULES DOES NOT STATE A BASIS FOR FEDERAL HABEAS CORPUS RELIEF.

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STATEMENT OF THE CASE

Respondent, JOHN HUDGINS, was originally charged by information on April 26, 1978 with attempted murder in the first degree (Count I), unlawful possession of a firearm while engaged in a criminal offense (Count II) and, unlawful possession of a firearm by a convicted felon (Count III). On September 6, 1978, pursuant to negotiations, a guilty plea was entered as to all charges. The Florida Circuit Court reduced the attempted murder count to aggravated battery. Hudgins was placed on probation for seven (7) years per count to run concurrently.

On January 15, 1979 at the conclusion of revocation proceedings, the Court found Hudgins in violation of his probation. Probation was revoked and Hudgins was sentenced to consecutive fifteen year imprisonment terms for Counts I, II and III.

On February 20, 1979, a Motion to Correct Unlawful Sentence pursuant to Florida Rules of Criminal Procedure 3.850 was filed by Hudgins requesting as post-conviction relief that his sentence be reduced by fifteen (15) years because the sentence was in direct violation of his negotiated plea and was in violation of Florida's then existing "single transaction" rule of Johnson v. State, 366 So.2d 418 (Fla. 1978). Argument was heard on Hudgin's Motion on February 26 and 28, 1979, at the conclusion of which the trial court denied relief. Notice

of Appeal to the District Court of Appeal of Florida, Third District, was timely filed on March 28, 1979.

The District Court of Appeal disposed of the case less than a month later (April 24, 1979) without the benefit of briefs or argument and affirmed the trial court. A Motion for Rehearing was filed on May 9, 1979 directing the District Court's attention to Johnson v. State. The State did not respond to the above Motion and the Motion was denied by the District Court by Order on June 8, 1979.

A petition for certiorari for review by the Florida Supreme Court was timely filed on May 17, 1979. The petition pointed both to the imposition of Hudgin's unlawful sentence as well as to a procedural conflict between the Second and Third Appellate Districts of Florida. Certiorari review was denied by written Order dated March 4, 1980.

On April 3, 1981, Hudgins filed a pro se petition seeking federal habeas corpus relief. The Honorable Eugene P. Spellman in an unpublished Memorandum Opinion and Order granted Hudgins' petition on October 23, 1981, ordering that he be resentenced in ninety (90) days. The State filed a Motion for Rehearing on November 2, 1981. The Motion was denied on February 8, 1982. On February 16, 1982, the State filed a Motion for Stay of Further Proceedings pending appeal and a Notice of Appeal. Judge Spellman granted the Stay on March 3, 1982 in Chambers.

Pursuant to local Rule 15 of the 11th Circuit, Hudgins petitioned the Court for appointment of counsel. This petition was approved and Theodore Klein, of Miami was appointed with instructions to file a brief. After the briefs were filed and oral argument held, the 11th Circuit per curiam affirmed the District Court without opinion. A motion for rehearing was denied and the State has now petitioned this Court for a Writ of Certiorari.

SUMMARY OF ARGUMENT

The decision below cannot raise significant questions since it has no precedential value. The District Court issued an unpublished memorandum opinion and order and the Eleventh Circuit per curium affirmed without opinion.

For purposes of federal habeas corpus relief, this Court has already established a very precise standard for evaluating whether or not state court remedies have been exhausted. No confusion exists.

The District Court, as affirmed by the Eleventh Circuit, properly followed this standard. Respondent exhausted all his state court remedies prior to seeking federal habeas corpus relief. The identical federal constitutional issue raised in federal court was first presented to the state courts.

The purpose of Florida's "single transaction" rule is identical to the purpose of the "double jeopardy" rule, namely to guard against dual sentencing for the same offense. Respondent was effectively sentenced twice for the same offense when he received a separate and consecutive sentence for a lesser-included offense.

Consequently, as a result of this violation of state law, Respondent was deprived of his federal constitutional right against double jeopardy. The federal court properly had jurisdiction to grant habeas corpus relief.

REASONS FOR DENYING WRIT

I. THE DECISION BELOW DOES NOT RAISE SIGNIFICANT AND RECURRING FEDERAL QUESTIONS INVOLVED IN "THOUSANDS OF HABEAS CORPUS PETITIONS" FILED BY STATE PRISONERS.

The State argues that the decision below is erroneous and presents an important question of federal constitutional law because the decision exacerbates the confusion that allegedly exists with regard to the standard by which federal district courts may judge whether or not state court remedies have been exhausted.

Respondent submits that since the decision below has no precedential value, it cannot exacerbate the alleged confusion and, furthermore, no such "confusion" exists. This Court has already established a very precise standard for evaluating whether or not state court remedies have been exhausted.

Even if it could be argued that the District Court's decision was incorporated into the Eleventh Circuit's affirmance by implication, the combined opinion also has no precedential value. The District Court issued an unpublished memorandum opinion and order and the Eleventh Circuit per curiam affirmed without opinion. A memorandum decision has no precedential value within the meaning of stare decisis and the courts will not cite or refer to memorandum decisions. Jones v. Superintendent, Virginia State Farm, 465 F.2d 1091 (4th Cir. 1972). Consequentially, the only opinion -- namely that of the

District Court -- has no precedential value either since it was not published.

Furthermore, since summary affirmances do not create binding precedence, Brown v. Liberty Loan Corp. of Duval, 539 F.2d 1355 (5th Cir. 1976); it follows that a per curiam affirmance without an opinion should not create binding precedence either. In both situations the court does not give any reasons for its ruling and therefore no "law" is created. E.g., Dept. of Legal Affairs v. Dist. Ct. of Appeal, 434 So.2d 310 (Fla. 1983); 20 Am. Jur.2d Courts §189 (1965).

This Court on numerous occasions has established a very precise standard by which federal district courts may judge whether or not the state court remedies have been exhausted. In Picard v. Connor, 404 U.S. 270, 275 (1971) this court reaffirmed the reasoning behind and precedures involving federal habeas corpus relief as follows:

> It has been settled since Ex parte Royall, 117 U.S. 241 . . . (1886), that a state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus. . . . The exhaustion-of-state-remedies doctrine, now codified in the federal habeas statute, 28 U.S.C. §2254(b) and (c), reflects a policy of federal-state comity, . . . "an accommodation of our federal system designed to give the State the initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." . . . We have consistently adhered to this federal policy, for "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an

> opportunity to the state courts to correct a constitutional violation." . . . It follows, of course, that once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied. [citations omitted]

The Picard court then went on to define the criteria for raising the federal claim:

> Obviously, there are instances in which "the ultimate question for disposition," . . . will be the same despite variations in the legal theory or factual allegations urged in its support. . . . Hence, we do not imply that respondent could have raised the . . . claim only by citing "book and verse on the federal constitution." . . . We simply hold that the substance of a federal habeas corpus claim must first be presented to the state courts. Id. at page 277, 278. [Emphasis added].

One year later this Court stated in Humphrey v. Cady, 405 U.S. 504, 516 (1972):

> There is, of course, no requirement that petitioner file repetitious applications in the state courts. . . . The question . . . is whether any of petitioner's claims is so clearly distinct from the claims he has already presented to the state courts that it may fairly be said that the state courts have had no opportunity to pass on the claim. . . [Emphasis added].

Again, just recently in 1982, this Court in Anderson v. Harless, 74 L.Ed.2d 3, 7 (1982) explained what Picard required of the state court proceedings:

> In Picard . . . we made clear that 28 U.S.C. §2254 requires a federal habeas petitioner to provide the state courts with a "fair opportunity" to apply controlling legal principles to the facts bearing upon his

> constitutional claim. . . . It is not enough that all the facts necessary to support the federal claim were before the state courts. . . . [T]he habeas petitioner must have "fairly presented" to the state courts the "substance" of his federal habeas corpus claim. [Emphasis added].

Therefore, construing these three opinions together, it follows that the federal claim can be raised in state court without specifically calling it by its federal name. All that is required is that the "substance of the federal claim" be presented so that the state court had a "fair opportunity to apply controlling legal principles to the facts" bearing upon the claim. Necessarily, this policy requires that each case be analyzed on an individual basis by the District Courts; resulting in discretionary decisions which will vary from circuit to circuit depending on the particular factual pattern of each case.

In summary, this Court has already provided sufficient guidance in this area and there is no "confusion." The only discretion left is to apply these guidelines to the particular fact pattern of each case. This is the responsibility of the District Court. Furthermore, the case in question could not add to this "confusion," even if it existed, since the instant case has no precedential value.

II. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT REQUIRING THE EXHAUSTION OF STATE JUDICIAL REMEDIES.

Notwithstanding the fact that the decision below was a per curiam affirmance without opinion and therefore cannot conflict with any published opinions of this Court, Respondent nevertheless submits that the District Court, as affirmed by the Circuit Court, precisely followed the holdings of Picard and Anderson.

Although the Respondent relied on Florida's "single transaction" rule during the state court proceedings, the District Court specifically found that the elements of proof necessary to prove a violation of the "single transaction" rule were identical to the elements of proof required to prove a federal double jeopardy violation. Therefore, the Picard test has been satisfied since the "substance of the federal claim" was presented to the state courts and they had a "fair opportunity to apply controlling legal principles to the facts" bearing upon the claim.

Unlike the instant case, in Picard this court stated:

> The only suggestions of a claimed denial of a federal right were statements in respondent's brief questioning the continuing validity of the holding in Gedzium that the provision of the Fifth Amendment that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" was inapplicable to the states. . . . We have examined the pretrial, trial, and appellate papers and do not discover any indication of an attack upon the prosecution under the indictment as

> violative of the Equal Protection clause of the Fourteenth Amendment. Id. at pages 273, 274. [Emphasis added].

And in Anderson this court, in reviewing the claims presented to the Federal District Court, stated:

> [I]t is plain from the record that this constitutional argument was never presented to, or considered by, the Michigan courts. Nor is this claim even the same as the constitutional claim advanced in Martin -- the defendant there asserted a broad federal due process right to jury instructions that "properly explain" state law. 392 Mich, at 558, 221 N.W.2d, at 339, and did not rely on the more particular analysis developed in cases such as Sandstrom. Id. at pages 7, 8. [Emphasis added].

As illustrated, although federal constitutional claims were presented to the state courts in both cases, entirely different claims were later presented to the federal district courts. Under those circumstances the determination that state court remedies had not been exhausted was entirely correct.

In the instant case, the identical federal constitutional claim was presented to both the state courts and the federal court. Therefore, the District Court, and the Circuit Court were absolutely correct when they determined that the state court remedies were exhausted.[1]

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[1]Assuming arguendo that Respondent were forced to relitigate the same issue in state court with the only change being the "title" of the action (federal double jeopardy violation instead of Florida "single transaction" rule violation), under the doctrine of collateral estoppel the action would be dismissed and many judicial hours would have been wasted. Greene v. Massey, 384 So.2d 24 (Fla. 1980); Hansen v. State, 420 So.2d 887 (Fla. 1st DCA 1982); Clowers v. State, 324 So.2d 641 (Fla. 3d DCA 1976).

III. THE FEDERAL CONSTITUTIONAL STANDARD TO ESTABLISH DOUBLE JEOPARDY IN VIOLATION OF THE FIFTH AMENDMENT IS SIMILAR TO FLORIDA'S "SINGLE TRANSACTION" RULE SO AS TO PERMIT THE DISTRICT COURT TO CONSIDER THE RESPONDENT'S CLAIM AS ONE INVOLVING DOUBLE JEOPARDY.

The "single transaction" rule had its origin in Simmons v. State, 10 So.2d 436 (Fla. 1942) wherein the Florida Supreme Court stated:

> There seems to be two classes of decisions on this subject. One of them holds to the principle that there should be one punishment where, as here, the various counts of the information presented different aspects of the same criminal transaction and that the court should impose a sentence on the count which charges the higher grade or degree of the offense. Another adhers to the rule that there may be a sentence on each count to run concurrently, the practical effect being infliction of but one punishment. . . . [Although] the counts present different aspects of a single criminal transaction . . . it would be possible for the court to impose a sentence of ten years on the first count and five years on the second count and to direct them to be served consecutively, thus inflicting a punishment of fifteen years imprisonment although but ten years could be imposed for the commission of the more serious crime charged in the first count of the information. Id. at page 439. [emphasis added]

The Court in enacting the "single transaction" rule was concerned that the Defendant could receive a double punishment for the lesser included crime -- the first punishment from the separate count; the second punishment from the count for the more serious crime which already included punishment for the lesser offense.

The Fifth Amendment to the Constitution of the United States provides in part:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb.

The "single transaction" rule and the "double jeopardy" rule have the identical purpose -- namely to bar double punishment for the same crime.

Recently, the Florida Supreme Court stated in Bell v. State, 437 So.2d 1057 (Fla. 1983) that the "single transaction" rule was related to the "double jeopardy" rule:

> . . . when one statutory offense includes all of the elements of the other, those two offenses are constitutionally "the same offense" and a person cannot be put in jeopardy as to both such offenses . . .
>
> . . . we hold that once it has been established that an offense . . . is a lesser included offense of a greater offense . . . then the double jeopardy clause prescribes multiple convictions and sentences for both the greater and lesser included offenses.

Therefore, since the purpose of the "single transaction" rule is identical to the purpose of the "double jeopardy" rule, the District Court was correct when it considered Respondent's claim as one involving double jeopardy.

IV. RESPONDENT'S DUAL SENTENCE FOR AGGRAVATED BATTERY AND FOR UNLAWFUL POSSESSION OF A FIREARM WHILE ENGAGED IN A CRIMINAL OFFENSE VIOLATES THE FIFTH AMENDMENT PROHIBITION AGAINST DOUBLE JEOPARDY.

The State argues that imposition of a consecutive sentence for a lesser included offense is not barred by the Fifth Amendment. This is true providing the sentencing is authorized by the state legislature.

This Court in Albernaz v. U.S., 450 U.S. 333 (1981) held that since the legislature had specifically authorized dual sentencing for the particular crimes involved, and since the Fifth Amendment is not a limitation on the power of state legislatures to impose consecutive punishments for crimes arising out of the same transaction, the defendant's right to be free of double jeopardy has not been violated.

In the instant case, the Florida legislature had specifically excluded lesser included offenses from consecutive sentencing.[2]

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[2]Florida Statute §775.021(4) (1976) states: "Whoever, in the course of one criminal transaction or episode, commits an act or acts constituting a violation of two or more criminal statutes, upon conviction and ajudication of guilt, shall be sentenced separately for each criminal offense, excluding lesser included offenses, committed during said criminal episode, and the sentencing judge may order the sentencing to be served concurrently or consecutively." [Emphasis added].

The State argues that aggravated battery is not a lesser included offense of unlawful possession of a firearm while engaged in a criminal offense and therefore, the consecutive sentencing prohibition under Florida Statute §775.021(4) does not apply. This is not true.

Contrary to the State's contention before this Court,[3] the Blockburger v. United States, 284 U.S. 299 (1932) test does show that aggravated battery is a lesser included offense of unlawful possession of a firearm while engaged in a criminal offense.

Application of the Blockburger test focuses on the statutory elements of the offenses charged and if each requires proof of the same facts, then one is a lesser included offense of the other.

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[3]It is interesting to note that the State has completely reversed its position before this Court. On page 24 of the State's initial brief to the Eleventh Circuit, the State conceded that aggravated battery was a lessser included offense of unlawful possession of a firearm while engaged in a criminal offense when it said:

> Focusing only on the elements of each offense, . . . the crime of possession of a firearm during the commission of a felony requires proof of . . . aggravated battery. . . .[T]he latter offense is necessarily included within the former. Hudgins, then, could not be sentenced both for aggravated battery and possession of a firearm during the commission of an aggravated battery. [Emphasis added].

Florida law has specifically found that aggravated battery and unlawful possession of a firearm while engaged in a criminal offense have identical elements. The Florida Third District Court of Appeal in Jenrette v. State, 390 So.2d 781 (Fla. 3d DCA 1980) said the following:

> Insofar as their elements are concerned, the crimes of which Jenrette was found guilty, aggravated battery committed by shooting the victim with a firearm and the possession and use of a firearm in the commission of the felony of aggravated battery, are identical. [Emphasis added].

The Supreme Court of Florida in State v. Carpenter, 417 So.2d 986 (Fla. 1982) stated that the Blockburger test is to be used for determining the lesser included crime requirements. Jenrette established that the elements of aggravated battery and unlawful possession of a firearm while engaged in a criminal offense are the same.

Therefore, under the dictates of Carpenter and Blockburger, and consistent with Florida Statute §775.021(4), the imposition of consecutive sentences for each count (when Count I was a lesser included offense of Count II) was a violation of Respondent's Fifth Amendment right against double jeopardy. Whalen v. U.S., 445 U.S. 684 (1980); Bell v. State, supra.

V. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT WHICH HOLD THAT CHALLENGES TO THE STATE COURT'S APPLICATION OF ITS OWN LAWS OR RULES DOES NOT STATE A BASIS FOR FEDERAL HABEAS CORPUS RELIEF.

The State contends that since the Respondent "challenged the state court's application of a local rule," no basis for federal habeas corpus relief exists.

This is true as far as it goes. Federal habeas corpus relief is available if a prisoner is deprived of his federal constitutional rights as a result of the state misapplying its own laws. Engle v. Isaac, 456 U.S. 107 (1982).

The Respondent was sentenced and his case was reviewed by the state courts under the then existing "single transaction" rule of Johnson v. State, 366 So.2d 418 (Fla. 1978). The Federal District Court reviewed Florida's disposition of the case under then existing Florida law to determine if Respondent's federal constitutional rights were violated.

Respondent was sentenced in violation of state law. After exhausting his state remedies, he sought relief in the United States District Court. Florida Statute §775.021(4) expressly prohibits imposition of the sentence the Respondent received and, therefore, under Whalen he had a Fifth Amendment right to be protected against double jeopardy and as such properly sought his remedy in the United States District Court.

CONCLUSION

Based on the foregoing law and argument, JOHN HUDGINS respectively requests that this Court deny the State's petition for writ of certiorari.

Respectfully submitted,

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By: Joseph H. Serota by JB
JOSEPH H. SEROTA

By: Theodore Klein by JB
THEODORE KLEIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Opposition Brief of Respondent on Jurisdiction was furnished by mail this 15th day of March, 1984, to Theda James Davis, Esq., and Robert J. Landry, Esq., Office of the Attorney General, 1313 Tampa Street, Suite 804, Tampa, Florida 33602.

By: Joseph H. Serota by JB
JOSEPH H. SEROTA

Case No. 83-97

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

LOUIE L. WAINWRIGHT, Secretary
Department of Offender Rehabilitation
State of Florida

Petitioner,

vs.

JOHN HUDGINS,
#045861

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN
FORMA PAUPERIS AND APPOINTMENT
OF COUNSEL

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COMES NOW, the Respondent, JOHN HUDGINS, and moves this Court for leave to proceed in forma pauperis and, if the Petition For Writ of Certiorari is granted, appointment of counsel; and for grounds thereof will show the following:

I FACTS

Respondent JOHN HUDGINS was sentenced to three consecutive fifteen year imprisonment terms by the Circuit Court of Dade County, Florida. After exhausting all his state appellate remedies, he filed a pro se petition seeking habeus corpus relief to the U.S. District Court for the Southern District of Florida. The Honorable Eugene P. Spellman in a Memorandum Opinion and Order granted HUDGINS' petition ordering that he be resentenced within 90 days. After the state's motion

for rehearing was denied, the State filed a Notice of Appeal to the 11th Circuit. Pursuant to local Rule 15 of the 11th Circuit, HUDGINS petitioned the Court for appointment of counsel. This petition was approved and Theodore Klein, of Miami was appointed with instructions to file a brief. After oral argument, the 11th Circuit per curiam affirmed the District Court without opinion. A motion for rehearing was denied and the State has now petitioned this Court for a Writ of Certiorari.

II ARGUMENT

This Motion is filed in accordance with Supreme Court Rule 46 which permits a party to petition this Court for leave to proceed in forma pauperis. Pursuant to this Rule, no affidavit is required since counsel was appointed by the Court of Appeals under the Criminal Justice Act of 1974, as amended. Local Rule 15 of the 11th Circuit specifically provided that counsel was appointed because HUDGINS was financially unable to obtain adequate representation and that his appeal was to proceed in forma pauperis.

III CONCLUSION

Respondent is still in prison and unable to afford adequate representation, nor the expense of preparing and printing a response to the Petition for Writ of Certiorari. It is therefore prayed that this Court grant this Petition to Proceed in Forma Pauperis and if the Petition for Writ of Certiorari is granted, pursuant to Supreme Court Rule 46.7 appoint Theodore Klein as Respondent's counsel.

Respectfully submitted,

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By: _____
THEODORE KLEIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion was furnished by mail this 1 day of February, 1984, to Robert J. Landry, Esq., Office of the Attorney General, 1313 Tampa Street, Suite 804, Tampa, Florida 33602.

By: _____
THEODORE KLEIN

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